

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 42029-5

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

BRAD CHINN,

Respondent,

v.

CITY OF SPOKANE, Et al,

Appellant.

**OPENING BRIEF OF RESPONDENT
(GENERAL ORDER 2010-1)**

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I. INTRODUCTION

The Superior Court was correct in holding that the City Council's decision in approving the rezone application from O-35 to O-150 was an erroneous interpretation of the law. Not only did the City fail to consider residential areas and ignore its own "Office" definition which is intended to be of a "scale and character similar to nearby residential development" and "low-intensity", it also failed to be consistent with its own Comprehensive Plan designation and goals. The conclusions of the lower body were not supported by the evidence in regard to intensity and the application of the law to the facts was erroneous in failing to look at the nearby residential areas.

The City Council erred in allowing this rezone by: erroneously interpreting the law, making a land use decision that was not supported by substantial evidence, and making a decision that is a clearly erroneous application of the law to the facts as shown by the record, approving a rezone from a maximum 35 foot restriction to a maximum 150 foot tower in this mainly low-density area.

II. ISSUES ON APPEAL

- 1) Was the Superior Court correct in finding that the City Council erred in interpreting Spokane Municipal Code 17C.120.030 when

the City considered only nearby zones and not “residential areas”, and ignored its own “Office” designation which is intended to be of a “scale and character similar to nearby residential development”?

2) Was the Superior Court correct in finding that the City Council erred in interpreting Spokane Municipal Code 17C.120.030 when the City considered only nearby zones and not “residential areas”, and ignored its own “Office” designation which is intended to be “low intensity”?

3) Did the City Council err in failing to be consistent with the Comprehensive Plan, and in failing to consider the entire Comprehensive Plan in its interpretation of the Comprehensive Plan by ignoring Chapter 3, specifically Land Use Policies 3.5 and 3.2, and definitions?

Stated generally, Respondent alleges that the City Council erred in all of the above issues by: 1) erroneously interpreting the law, 2) that the land use decision was not supported by substantial evidence, and 3) the land use decision is a clearly erroneous application of the law to the facts. RCW 36.70C.130.

III. STATEMENT OF THE CASE

A. PROCEDURAL POSTURE

West Central Development, LLC (hereinafter referred to as “West Central”) filed a new application for a rezone of property located at: 1301, 1309, 1315, 1321 & 1325 W. Mallon Ave., 817 N. Adams St., and 1324 and 1328 W. Broadway from O-35 (Office up to 35 feet in height) to O-150 (Office designation up to 150 feet in height) on or about July 7, 2009. R Sec. 1, p.42-52. (All references to “R” are to the Record of the City Council). On October 27, 2009, the matter proceeded to hearing before the Hearing Examiner, who previously heard a similar matter involving the same parties and the same parcel. R Sec. 1, P. 15-34. The rezone was approved with conditions on November 9, 2009. CP 13-21. He curiously relied on a prior City decision which findings have since been overturned by this Court. R. Sec. 1, p. 11. “... the Hearing Examiner finds that the City Council decision on the land use plan is controlling, therefore this proposal has found to be consistent with the plan”. *Id. Chinn v. City of Spokane*, 157 Wn. App. 294, 236, P.3d 245 (2010) (hereinafter referred to as “Chinn I”).

On November 23, 2009, Chinn appealed the decision of the Hearing Examiner. Oral argument was heard by the City Council on May 3, 2010

(Transcript R, Sec. 3, p. 251-285). The City then later issued its opinion approving the rezone. CP 34-41. On Chinn's appeal, the Superior Court heard argument to overturn the City Council's Decision on January 12, 2011. CP 162. A decision was issued in favor of Chinn, overturning the City's decision to allow the rezone on March 12, 2011. CP 162-176. West Central Development, LLC now appeals this decision, however Chinn is filing this opening brief pursuant to General Order 2010-1, as ordered by this Court.

B. FACTUAL BACKGROUND

- 1. This Property, although zoned O-35, is in a neighborhood that is composed of mostly small scale offices, many of which are former residences, with additional residential uses. Further, this site is not located in a City Corridor, Neighborhood Center or in the Downtown Plan, North Bank or Medical District where higher intensity office areas are allowed.**

This rezone request affects almost an entire block of parcels, specifically eight parcels. R Sec.1, p. 6. This exact site was the subject of a prior rezone application in Chinn I (issue was adding retail as well as height in the prior application.) *Chinn v. City of Spokane*, 157 Wn. App. 294, 236 P.3d 245 (2010).

This site is not located in a City Corridor, Neighborhood Center or in the Downtown Plan, North Bank or Medical District where higher intensity office areas are allowed. *Id.*, R. Sec. 1, p.7, Spokane

Comprehensive Plan CP 65-95, Spokane Comprehensive Plan Section, LU 1.5, CP 71.

The surrounding area consists of mostly small scale offices, many of which are former residences, 157 Wn. App. at 296, R. Sec. 1, p.7. The historic Gables Apartments are located on the same block. R. Sec 1, p. 7, 17. There is also a single family home on the block. R. Sec. 1 p. 17, 19. There are also some residential uses of varying densities. R. Sec. 1, p.7. The exception to this is the County Courthouse Complex, which is zoned CB 150, and designated “Institutional” on the Comprehensive Plan. R. Sec. 1, p.7. “The record indicates that the area surrounding the Property was developed with low intensity office use.” 157 Wn. App. at 302.

In terms of the composition of this neighborhood, (and in the City as a whole) a 150 foot office building is a monstrosity if allowed outside of the core areas referred to above.

2. This property is not located in an area designated for high intensity use.

This Court, in Chinn I found based on the facts that it is undisputed that the Property was not located in an area designated for high intensity use, and that the area surrounding the Property was developed with low intensity office use. *Chinn v. City*, 157 Wn. App. at 303. Although the legal issues surrounding the prior rezone request to OR-150 were a bit

different because of the retail aspect and because of the limited issues on review in that case, the factual findings in regard to surrounding properties at this same location have not changed.

IV. ARGUMENT

A. Standard of Review

Under LUPA, this Court stands in the shoes of the Superior Court and limits its review to the record before the City Council. *Phoenix Dev. Inc. v. City of Woodinville*, 171 Wn.2d 820, 256 P.3d 1150 (2011), *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002).

The standard of review in this case is set forth in RCW 36.70C.130(1)(b)(c)(d), which authorizes invalidation of the City Council's decision if that decision is: (1) is an erroneous interpretation of the law; (2) is not supported by substantial evidence; (3) is a clearly erroneous application of the law to the facts. *Id.*, RCW 36.70.130(1). A finding is clearly erroneous under RCW 36.70C.130(1)(d) when, although there is evidence to support it, the reviewing court of the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Phoenix*, 171 Wn.2d at 838.

Proponents of a rezone have the burden of proof in showing (1) that conditions have changed since the original zoning, or that the proposed rezone implements policies of the comprehensive plan; and (2) that the rezone bears a substantial relationship to the public health, safety, morals, or welfare. *Woods v. Kittitas County*, 130 Wn. App. 573, 584, 123 P.3d 883, 888 (2005), *affirmed*, 162 Wn.2d 597; 174 P.3d 25 (2007). Additionally, Spokane County requires that the applicant must present sufficient evidence relevant to the appropriate criteria and the decision maker must make affirmative findings of fact relevant to each criterion or the application must be denied. Spokane Municipal Code 17G.060.170.

The criteria at issue are:

1) The proposal is allowed under the provision of the land use codes; 2) The proposal is consistent with the comprehensive plan designation and goals, objectives and policies for the property; and 5) The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be placed on the proposal to avoid significant effects or interference with the use of neighboring property or the surrounding area, considering the design and intensity of the proposed use.

Spokane Municipal Code 17G.060.170(C)(1),(2) and (5).

B. The Superior Court was correct in finding that the City Council erred in interpreting Spokane Municipal Code 17C.120.030 when the City failed to consider only nearby zones and not residential areas, and in ignoring its own “Office” designation intending buildings to be of a “scale and character similar to nearby residential development”.

The Superior Court was correct in finding the City Council made an error in law in regard to the rezone request. A rezone is not presumed to be valid, and a proponent of a rezone must show either a change in circumstances which would allow the zone change or that the proposed rezone implements the policies of the Comprehensive Plan. *Woods v. Kittitas County*, 130 Wn. App. 584 (2005).

There are different categories of use as defined by Spokane Municipal Code 17C.120.030:

A. Office (O).

The office zoning category is located in areas designated office on the land use plan map of the comprehensive plan. The Office (O) zone is used on small sites in or near residential areas or between residential and commercial areas. It is intended to be a low intensity office zone that allows for small-scale offices in or adjacent to residential neighborhoods. The allowed uses are intended to serve nearby neighborhoods and/or have few detrimental impacts on the neighborhood. Development is intended to be of a scale and character similar to nearby residential development to promote compatibility with the surrounding area. Spokane Municipal Code 17C.120.030.

Another Code Section discussing height is: Spokane Municipal Code 17C.120.220, which discusses “zones” as well as “residential areas” as referred to in Spokane Municipal Code 17C.120.030.

The height limits in the O, NR and NMU zones discourage buildings that visually dominate adjacent residential areas. The height limits in OR, CB and GC zones allow for a greater building height at a scale that generally reflects Spokane’s commercial areas. Light, air and the potential for privacy are intended to be preserved in single-family residential zones that are close to commercial zones. Spokane Municipal Code 17C.120.220.

As noted by the Superior Court, in regard to Spokane Municipal Code 17C.120.030. “Clearly this section discusses the importance of considering nearby residential “areas”, not just “zones”. CP 171.

Further, the City erred, in comparing the scale and character to the nearby commercial zones. The Code states that Office is “intended to be of a scale and character similar to nearby residential development”. Spokane Municipal Code 17C.120.030, CP 172. This is bolstered by Spokane Municipal Code 17C.120.220 that indicates that it is a consideration to discourage buildings that visually dominate adjacent residential areas. As noted by the Superior Court, “Nothing in the record truly supports the concept that an office building of up to 150 feet

would in any way serve the adjacent *residential* areas.” CP172. This shows that the factual findings of the City were error.

A good analysis is made by the lower Court that “it seems to go without saying that a three story office building is a horse of a different color than a potentially fifteen-story one”. It would obviously overshadow nearby residences, apartments, and other small offices to the north, west and south. There is evidence in the record to show the visual domination—for instance: “The proposed tower would cast a shadow on our building” R. p. 214. The testimony from residents is that it will visually dominate adjacent residential areas. See R. Sec 1, p. 200, 204, 208. CP 55. A neighborhood property owner states, “We are strongly against such a proposal. Our small apartment building would be almost buried by a structure, seriously decreasing its value. Our tenants would never see the light of day, our building would be in a shadow for most of the day. R. Sec. 1, p.204. CP 55. In addition, it would compete with the skyline of the historic courthouse. CP 173. It also is logical to find that a 150 foot tower is not a “small scale office”, and does not fit with the scale and character of this neighborhood – residential or office.

C. The Superior Court was correct in finding that the City Council erred in interpreting Spokane Municipal Code 17C.120.030 when the City failed to consider only nearby zones and not residential areas, and in ignoring its own "Office" designation intending buildings to be of a "low intensity".

Similarly, the City ignored the portion of Spokane Municipal Code 17C.120.030, or made a non-sensical factual analysis when determining that a 150 foot building would still be "low intensity". In addition to the reasons stated above in regard to a three story building versus a potentially 15 story one, and common sense in regard to the matter, other things may be looked at to determine what this means.

As the Spokane Municipal Code and Comprehensive Plan do not specifically define "intensity", synonyms should be looked to for assistance: ¹

"intensity" n. force, concentration, strength, power, magnitude, severity, potency, vigor, depth, volume, ferocity, violence, sharpness, passion, earnestness, ardor, fervor.

"intensify" v. concentrate, strengthen, deepen, sharpen, **HEIGHTEN**, magnify, amplify, escalate, raise *beef up, step up, redouble.

Roget's Super Thesaurus, Writer's Digest Books, 1995 Edition, p. 278 (1995) (emphasis added).

¹ synonym n 1: one of two or more words or expressions of the same language that have the same or nearly the same meaning in some or all senses. *Merriam Webster's Collegiate Dictionary*, Tenth Edition, p. 1197 (1999).

Following logically, a higher intensity would mean to heighten the building, or to increase in volume, and lower intensity would mean a lower height.

In fact, this Court previously found in *Chinn I* that based on the facts that it is undisputed that the Property was not located in an area designated for high intensity use, and that the area surrounding the Property was developed with low intensity office use. *Chinn v. City*, 157 Wn. App. at 303. The City erred in its decision, as their finding was not supported by substantial evidence, and it was a clearly erroneous application of the law to the facts. It appears that the City is ignoring certain facts in the record. “How this would be ‘compatible’ with the surrounding development is, therefore, questionable, the City’s bold assertion that there was ‘no documentation that the proposal would visually dominate adjacent residential uses’ to the contrary notwithstanding”. CP 173. Also see, R. Sec 1, p. 197-200, 204-210, 212, 214, 218. CP 56. A finding is clearly erroneous under RCW 36.70C.130(1)(d) when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. RCW 36.70C.130, *Phoenix*, 171 Wn.2d at 838.

D The City Council erred in failing to be consistent with the Comprehensive Plan designations and goals, and in failing to consider the entire Comprehensive Plan by ignoring Chapter 3, specifically Land Use Policies 3.5 and 3.2 with definitions.

The City neglected to consider the entire Comprehensive Plan. The City seemed stuck on a prior argument (Chinn I), where the issues were restricted for procedural reasons. See, CP 168-169.

The City failed to consider the Spokane Comprehensive Plan, Chapter 3, and specifically, Land Use Policy 3.2 which encourages growth within centers and corridors. Spokane Comprehensive Plan, Section LU 3.2. This property is not located in a center or corridor.

In Section 3.5, Description of Land Use Designations,

Office: The Office designation is usually freestanding small office sites and larger sites with two or more buildings located along arterial streets or intersections or as a buffer adjacent to residential areas. **Higher intensity office areas should be located around downtown Spokane in the North Bank and Medical District shown in the Downtown Plan.** (Emphasis added).

Spokane Comprehensive Plan, Chapter 3, 3.5, page 34. (CP 94).

As discussed above, this request to rezone to 150 feet is “higher intensity” than the current O-35 designation which indisputably consists mainly of freestanding small office sites, and some residential uses.

Further clarifying the issue, the Plan states in LU Policy 3.2 states in part,

Neighborhood centers are to promote social interaction and to provide a focal point for the center. A gathering place such as a civic green square or park should be provided to identify the center as a major activity center of the neighborhood. It is important to encourage buildings in the **core area of the neighborhood to be taller. Buildings up to three stories are encouraged in this area...As a general rule, the amount of commercial space and percent devoted to office and retail should be proportional to the number of housing units in the neighborhood. The size of individual commercial buildings should be limited to assure that the business is truly neighborhood serving...** Spokane Comprehensive Plan, Land Use Policy 3.2, CP 77.

This helps to clarify that the taller buildings should be in a center, and an example of “taller” is given as three stories. Not 15. The tallest Office classification of 150 should be saved, as designated in Land Use Policy Section 3.5, **“around downtown Spokane in the North Bank and Medical District shown in the Downtown Plan”**, where “higher intensity” office areas “should be located” according to the Comprehensive Plan.. CP 94.

To approve this rezone outside of these designated areas would be error, and precedent setting. CP 54. Monstrous 150 foot office towers should be build where space for higher intensity buildings are allowed, around downtown Spokane in the North Bank and Medical District shown

in the Downtown Plan. Again, the City ignores the Comprehensive Plan, which is error, as they have codified this requirement in Spokane Municipal Code 17G.060.170.

Spokane Municipal Code 17G.060.170 states in pertinent part that the burden is on the **applicant** to present sufficient evidence relevant to the appropriate criteria in support of the application. The decision maker (city) must make affirmative findings of fact relative to each criterion, or the application must be denied. Spokane Municipal Code 17G.060.170.

The criteria Chinn believes have not been met are: 1) The proposal is allowed under the provisions of the land use codes, 2) the proposal is consistent with the comprehensive plan designation and goals, objectives and policies for the property, and 5) the proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary conditions can be place on the proposal to avoid significant effects of interference with the use of neighboring property or the surrounding are considering the design and intensity of the proposed use. Spokane Municipal Code 17G.060.070.

As indicated in sections B and C of this Argument, this proposal is not allowed under the provisions of the land use codes, making the application fail. It is further disallowed under Spokane Municipal Code

17G.060.070. This section submits that the City also ignored the Comprehensive Plan sections at issue in THIS appeal. The city referenced the argument in Chinn I regarding LU 1.5, which the Hearing Examiner also mistakenly referred to. “The Hearing Examiner finds that the City Council decision on the land use plan is controlling” – when no City decision had been issued yet in regard to this specific matter. R. Sec 1., p. 11, CP 37. Again, the issues were confined for procedural reasons in Chinn I to section 1.5 rather than allowing argument on the entire Comprehensive Plan. CP 169.

The City ignores the intensity issue, and the remainder of the Comprehensive Plan saying only that “offices are an allowed use in the Office zone and the Office zone does not restrict or define higher intensity offices” in its “findings” that the rezone is consistent with the Comprehensive Plan. CP 37. The Comprehensive Plan language, cited above, was ignored, and not considered by either the Hearing Examiner, or the City. These standards, as stated in Spokane Municipal Code 17G.060.070 cannot be ignored. The proposal for rezone must be consistent with the comprehensive plan designation and goals, objectives, and policy for the property. To ignore this is a clearly erroneous application of the law to the facts and an erroneous interpretation of the law.

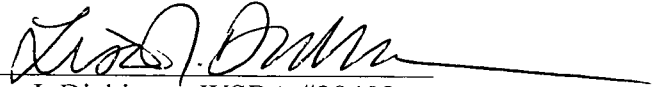
V. CONCLUSION

The decision of the Superior Court reversing the City Council's decision is correct in its effect. This rezone request from Office 35 to Office 150 is astounding in its deviance from the area impacted. The City turned a blind eye to the neighboring residential areas, to its own statutes mandating "scale and character similar to nearby residential development" and "low intensity", and to its own Comprehensive Plan, which puts tall private office buildings in other specific locations.

The effect of the City ignoring the Municipal Code and the Comprehensive Plan by allowing this rezone would have enormous impact. It would allow for 150 foot office towers to be built at almost any location zoned "Office" that was near any other zone. It would allow the City to ignore nearby residential areas as it is doing here. The City Council decision is an erroneous interpretation of the law, is not supported by substantial evidence when viewed in light of the whole record, and the land use decision is a clearly erroneous application of the law to the facts. Respondent respectfully requests that the decision of the Superior Court be affirmed, reversing the City's decision, and denying the application for a rezone to O-150.

RESPECTFULLY SUBMITTED this 21st day of November,
2011.

DICKINSON LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Lisa J. Dickinson", is written over a horizontal line.

Lisa J. Dickinson WSBA #29402
Attorney for Brad Chinn

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 22nd day of November, 2011, I
caused a true and correct copy of the foregoing OPENING BRIEF OF
RESPONDENT to be forwarded, with all required charges prepaid, by the
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